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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM CHARLES GATES,

Defendant and Appellant.

D074792

(Super. Ct. No. SCD274056)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed in part and remanded with directions.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Following a court trial, William Gates was found guilty of assault with force likely to produce great bodily injury (Pen. Code,<sup>1</sup> § 245, subd. (a)(4); count 1), battery with serious bodily injury (§ 243, subd. (d); count 2), and battery by gassing a peace officer (§ 243.9, subd. (a); count 3). The court also found Gates inflicted great bodily injury in count 1 (§ 12022.7, subd. (a)). In addition, the court found Gates had suffered two prison priors (§ 667.5, subd. (b)), one serious felony prior conviction (§ 667, subd. (a)(1)), and one strike prior (§ 667, subds. (b)-(i)).

The court sentenced Gates to a determinate term of 17 years in prison.

Gates appeals, raising only one issue on appeal. He contends his case must be remanded to the trial court in light of Senate Bill No. 1393 which now permits the trial court to strike serious felony prior convictions under section 1385 in the furtherance of justice. Although Senate Bill No. 1393 took effect on January 1, 2019, Gates contends we must treat the amendments as retroactive to cases which were not yet final on appeal as of the effective date of the new statute. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).)

The People properly agree with Gates that the statute must be applied retroactively and that on this record we must remand the case to the trial court to permit Gates to bring a motion to strike the serious felony prior and to permit the court to exercise its discretion

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

to grant or deny the motion. We agree with the parties that we must provide Gates the opportunity to seek relief under Senate Bill No. 1393.<sup>2</sup>

## DISCUSSION

Prior to the passage of Senate Bill No. 1393 trial courts lacked the power to strike a serious felony prior conviction that was proved under section 667, subdivision (a). (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) Senate Bill No. 1393 amended section 1385, subdivision (b) to permit trial judges, in their discretion to dismiss such prior convictions at sentencing.

Since Senate Bill No. 1393 presents the opportunity for a reduced sentence, the principles expressed in *Estrada, supra*, 63 Cal.2d at p. 744, we must apply its provisions retroactively to this case which is not final on appeal. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974.)

In this case, the proper remedy is to vacate the sentence and remand the case to the trial court to exercise its discretion to grant or deny a motion to strike the serious felony prior. Since the trial court did not have the authority to strike such prior at the time of sentencing in this case, it is understandable that there was no discussion of such remedy in the trial court. Thus, nothing in the record indicates the trial court would not consider a motion under section 1385.

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<sup>2</sup> The facts of the underlying offenses are not relevant to the single issue raised on this appeal. We have therefore omitted the traditional statement of facts.

## DISPOSITION

The case is remanded to the trial court with directions to vacate the sentence and to permit Gates to file a motion to strike the serious felony prior conviction alleged under section 667, subdivision (a). If the court grants the motion it shall resentence Gates accordingly and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. If the court denies the motion it shall reinstate the current judgment. We express no opinion as to how the trial court should rule on the motion.

In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.